No. 08-608

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT FLIPPING and ARTHUR SNELLBAKER,

Petitioners,

v.

ROBERT REILLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

Currently pending before the Court is the joint petition for a writ of certiorari filed on behalf of Arthur Snellbaker and Robert Flipping which, in pertinent part, is based upon Petitioners' belief that the Third Circuit's decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), is in conflict with this Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as well as other post-*Garcetti* decisions rendered in other Circuits. Initially, Respondent, Robert Reilly, waived his right to file a response. However, on December 2, 2008, the Court directed Respondent to respond to the petition. In accordance therewith, Respondent submitted a brief in opposition to the pending petition, which was docketed on January 22, 2009. Since that time, additional research has led to the discovery of the Eleventh Circuit's decision in *Kahn v. Fernandez-Rundle*, 287 Fed. Appx. 50 (11th Cir. 2007), wherein it was held that an attorney's in-court statements were not entitled to First Amendment protection in light of *Garcetti*. Because of the significance of the *Kahn* decision and its direct impact on the pending petition, Petitioners hereby submit this supplement brief pursuant to Rule 15.8 for the Court's consideration.[1]

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1. Petitioners acknowledge that *Kahn* was decided prior to the filing of the pending application. Despite extensive research, Petitioners were not aware of this opinion from the Eleventh Circuit until now. Given the importance of the constitutional issue presented by the matter *sub judice*, it is respectfully submitted that this supplemental brief has been filed in good faith and consistent with Rule 10, which sets forth the considerations governing review on certiorari.

ADDITIONAL REASONS FOR GRANTING THE WRIT

Notwithstanding this Court's holding in *Garcetti*, *supra.*, the Third Circuit in *Reilly*, *supra.*, held that a public employee's testimony in court, even when made pursuant to the official's duties, is protected by the First Amendment. *Id.* at 231. In stark contrast, the Eleventh Circuit in *Kahn*, *supra.*, held that statements made by an attorney in court were not protected where those statements were made pursuant to the attorney's official duties. *Id.* at 54. As things stand now, a public employee who walks into court and testifies pursuant to his/her official duties is cloaked with First Amendment protection, while at the same time a government attorney, bound by rules of professional conduct and ethics which demand nothing less than complete candor toward the tribunal, who makes statements in-court pursuant to his/her official duties is not. That such an anomalous situation exists is reason alone to grant the within petition.

As the Eleventh Circuit aptly stated in *Kahn*: "The fact that Kahn's speech occurred in a courtroom (and not in an internal memorandum) does not change the analysis required by *Garcetti*. When a lawyer speaks as an 'officer of the court' he is necessarily speaking as his client's representative. Nothing in the relevant bar rules changes the fact that Kahn's speech 'owes its existence' to his role as the government's lawyer." *Id.* at 53. The Third Circuit, however, does not appear to agree with this line of reasoning. As the Panel in *Reilly* stated: "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/

her independent obligation as a citizen to testify truthfully." *Id.* at 231. The inconsistency in these two approaches is readily apparent and serves as yet another basis upon which the petition can and should be granted.

Presumably when this Court made the unequivocal statement in *Garcetti* that "the controlling factor" is that the public employee's expressions are made pursuant to his/her official duties, *id.* at 421, it meant what it said. Indeed, it is submitted that this language could not be any more clear and unambiguous, as evidenced by not only the Eleventh Circuit's decision in *Kahn*, *supra.*, but also the numerous other decisions cited in the original petition which have followed the "official duties" test enunciated in *Garcetti*. In *Reilly*, however, the Third Circuit chose not to follow this test, and instead created its own test focusing on the forum through which Respondent's speech was conveyed. That a conflict exists is undeniable. The only way to reconcile the conflict and settle the issue once and for all is to grant the within petition.

CONCLUSION

For the forgoing reasons, as well as those set forth in the original petition, it is respectfully requested that the Supreme Court grant review of this matter.

Respectfully submitted,

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